

# Protecting the Elderly: Policy Lessons from an Analysis of the United States and Japan

Bryan A. Liang\* & Fusako Seki\*\*

## Abstract

Across both Japanese and United States cultures, the problem of elder abuse is extant. Laws and policies have attempted to address this most important of social welfare concerns. Comparative analysis indicates that each country may learn lessons from the other. Issues of reporting, liability, and the legal status of ombudsmen, service availability, increased funding, and other concerns can be complementarily applied by policymakers from both countries. This issue

---

\* E. Donald Shapiro Distinguished Professor; Executive Director, Institute of Health Law Studies, California Western School of Law; Co-Director, San Diego Center for Patient Safety, University of California, San Diego School of Medicine, San Diego, CA USA; Board of Directors, National Committee for the Prevention of Elder Abuse (USA). B.S. Massachusetts Institute of Technology; Ph.D. Harris School of Public Policy Studies, University of Chicago; M.D. Columbia University College of Physicians & Surgeons; J.D. Harvard Law School. Email: baliang@alum.mit.edu.

\*\* Visiting Scholar, Institute of Health Law Studies, California Western School of Law, San Diego, CA USA; Associate Professor of Social Welfare Law, International Graduate School of Social Sciences, Yokohama National University, Yokohama, Japan. B.L. Tokyo University, M.A., Ph.D. Hokkaido University. Email: chako@ynu.ac.jp.

has important ramifications in other areas, and must be addressed for this generation of elders, and all future generations.

## I. Introduction

The graying of the population in Japan and the USA is a quickly advancing trend. The number of elderly in Japan, defined as those over age 65, reached a record 28 million, or 22.4% of the population in 2009.<sup>1)</sup> Similarly, in the USA, 37 million, or 12.5% of its population was in this same age group.<sup>2)</sup> These numbers are only anticipated to grow at record levels over the next several decades.<sup>3)</sup> This reflects the advances of medical and social means that allow increases in life expectancy and declining birth rate, especially in Japan.<sup>4)</sup>

This increase in the elderly population creates important policy considerations in the care of these populations.<sup>5)</sup> Of great importance is the potential for this group to be exploited and subject to elder abuse both in the community setting as well as the institutional setting. Factors such as age, health, changes in cognitive status, and limited finances make them particularly vulnerable to abuse or mistreatment.<sup>6)</sup> Indeed, it is not uncommon for elderly abused victims to suffer from both some form of cognitive as well as physical deficit.<sup>7)</sup> Hence, an assessment of the strategies to combat this problem is essential to anticipate the challenges of protecting one of society's most vulnerable populations.

This paper will review the legal approaches to address elder abuse comparatively across USA and Japan. It then discusses lessons from this comparison. Finally, the paper offers some considerations for public policy that may provide guidance to future efforts to prevent and prosecute this growing and important social problem.

## II. USA Regulation

### A. Legal Basis

In the United States, the legal definition of elder abuse varies from state to state.<sup>8)</sup> Generally speaking, however, elder abuse is any action inflicting “unnecessary suffering, injury or pain, the loss or violation of human rights, and a decreased quality of life for the older person,”<sup>9)</sup> including “any knowing, intentional, or negligent act by a caregiver or any other person that causes harm or a serious risk of harm to a vulnerable adult.”<sup>10)</sup>

Despite the varying definitions, there are four main types of legally recognized elder mistreatment.<sup>11)</sup> These are physical abuse, psychological abuse, financial abuse, and neglect.<sup>12)</sup> Most reports of abuse involve more than one category of abuse.<sup>13)</sup>

### B. Types

In the USA, physical abuse is usually defined as violent conduct resulting in pain or bodily injury. This kind of abuse can include striking, sexual molestation, physical or chemical restraint of an elder person.<sup>14)</sup>

Psychological abuse is willful behavior by a perpetrator that creates significant mental anguish to an elderly person, and can include threats to harm, to institutionalize, or to isolate that person.<sup>15)</sup> Psychological abuse victims often show signs of depression, nervous system disorders, fearfulness, physical illness, and suicidality.<sup>16)</sup>

Financial abuse is considered the unauthorized or exploitative use of an elder person’s funds, property, or resources by the person’s relatives, caregivers, or others.<sup>17)</sup> Examples of financial abuse include taking money

or fraudulently inducing the elder to sign away amounts in bank accounts or other property.<sup>18)</sup> Financial abuse is often accompanied by physical or psychological abuse.<sup>19)</sup>

Neglect, an insidious form of elder abuse, is the willful or passive failure to fulfill a caretaking responsibility necessary to maintain the elder's physical and/or mental well-being.<sup>20)</sup> Examples of neglect include abandonment and denial of (or failure to provide) food or health services. Neglect includes intentional or negligent acts resulting from a caretaker's own frailty or ignorance; or it can arise from an overwhelmed or dysfunctional caregiving system, isolation of the senior, refusal of the elder to accept assistance, or other multiple complex causes.<sup>21)</sup> As a subset of neglect, self-neglect is self-directed behavior by an older person that threatens his or her safety or health.<sup>22)</sup>

### C. Mandated Reporting and Adult Protective Services

In the USA, the mainstay of elder abuse detection is community reporting of its incidence. In this vein, to try and increase the detection of elder abuse, most states have enacted mandatory reporting laws for individuals in a position to potentially observe it.<sup>23)</sup> For example, in California, under its state law a statutorily mandated reporter is "any person who has assumed full or intermittent responsibility for care or custody of an elder."<sup>24)</sup> Hence, any professional providing care or services to the elderly is a mandated reporter.<sup>25)</sup>

The legal standard for reporting potential abuse is "knowledge" or a "reasonable suspicion" that an abusive event has taken place, rather than absolute certainty of its occurrence.<sup>26)</sup> This reasonableness standard is important to encourage potential reporters to make such reports. Indeed, most states have immunity for good faith reporters and civil penalties for failure to report. However, some states, such as Virginia, have enacted criminal penalties

for making false elder abuse reports.<sup>27)</sup>

The primary state agency designated to investigate these reports of suspected domestic elder abuse is Adult Protective Services (“APS”).<sup>28)</sup> Especially for nursing homes, some states require reports of institutional elder abuse to be filed and investigated through the ombudsman program, while others designate APS.<sup>29)</sup>

Beyond reporting to APS, some states have also mandated governmental cooperation across agencies in addition to APS to promote detection and investigation of elder abuse situations.<sup>30)</sup> For instance, California requires cross-reporting of suspected elder abuse cases between APS and law enforcement agencies and authorities.<sup>31)</sup> Similarly, Maine requires that, in appropriate cases, APS-received complaints must be cross-reported to law enforcement agencies there.<sup>32)</sup>

Other states have been even more expansive. Virginia requires that APS work collaboratively with other state agencies to facilitate reporting.<sup>33)</sup> However, in addition, this state requires mandatory reporters that suspect elder abuse or neglect was the cause of death of an elderly person to report to both the medical examiner and law enforcement agency.<sup>34)</sup> Based on their expertise, the medical examiner and law enforcement agency can order an investigation or autopsy if they deem it necessary.<sup>35)</sup>

In a variation on the Virginia theme, Kentucky requires APS to cross-report to law enforcement within 24 hours of receiving a report or give immediate notice in emergency cases.<sup>36)</sup> The state also increases the prosecutorial duties of county attorneys.<sup>37)</sup> If there are adequate personnel, prosecutors are required to have an attorney trained in elder abuse and have a lead prosecutor for elder abuse cases.<sup>38)</sup> Also, when appropriate, prosecutors’ in Kentucky are mandated to make referrals to outside agencies for supportive

services for the elderly when a case is not prosecuted.<sup>39)</sup>

## D. Civil and Criminal Penalties: California as an Example

When elderly people are subject to elder abuse, they may sue privately in civil court, or the state can officially prosecute charges against the perpetrator as a criminal matter in criminal court. Below, the approach of the state of California is provided as an example since the state has the largest population of elderly USA citizens.<sup>40)</sup>

### 1. Civil Suits

In California, civil elder abuse litigation is governed by the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA, often pronounced as “ee-dac-pa”), passed in 1991.<sup>41)</sup> EADACPA defines types of elder abuse, civil causes of action available to those injured elders, and damages, as well as identifies mandated reporters and procedures for reporting suspected cases of abuse.<sup>42)</sup>

Under the law, private civil actions include suing for abuse and neglect of the elderly that resulted in great bodily harm or death, mental suffering, or embezzlement of funds of the elderly.<sup>43)</sup> The standard of proof in these civil cases is also defined in the statute. A civil lawsuit defendant accused of physical elder abuse and neglect requires a showing by the elder of such acts, other than financial abuse, by a “clear and convincing evidence” standard, a higher standard than the traditional “preponderance of the evidence” standard.

An important component of EADACPA is its fee provisions, which partially underlie the higher standard. Generally, in civil suits, under the “American Rule,” parties in a private civil lawsuit bear their own legal costs, which can be substantial. However, EADACPA changed this traditional rule to promote civil lawyer participation in these cases.<sup>44)</sup> If the defendant accused

of abuse can be shown to have been reckless, oppressive, fraudulent, or acting with malice when committing physical abuse and neglect of the elderly, the plaintiff is awarded not only provable monetary damages, but also his or her attorney's fees and costs.<sup>45)</sup>

For financial abuse cases under EADACPA, the law utilizes the traditional civil lawsuit "preponderance of the evidence" standard.<sup>46)</sup> However, again, to encourage lawyer participation in these suits, if it can be shown that the defendant has been guilty of recklessness, oppression, fraud, or malice while committing the financial abuse against the elderly person, the American Rule again is removed, and the elder's attorney's fees and costs can be awarded similar to physical abuse circumstances that reach this level of proof.<sup>47)</sup>

Beyond EADACPA specifically, there are several other related statutes relating to elder abuse. The California Probate Code prohibits those convicted of elder abuse from receiving inheritances from their victims.<sup>48)</sup> Also, an elder abuse victim who is a party to a civil action and is greater than age 70 may petition the court for an expedited trial, and if the court grants the motion, the trial may begin within 120 days from the date the motion was granted.<sup>49)</sup>

## 2. Criminal Statutes

Elder abuse is also conduct punishable by the criminal law.<sup>50)</sup> In California, the principal elder abuse statute defines criminal misdemeanor physical abuse, felony physical abuse, criminal financial abuse by a caretaker, and criminal financial abuse by a non-caretaker.<sup>51)</sup> This criminal law punishes "any person who ... willfully causes or permits any elder or dependent adult ... to suffer ... unjustifiable pain or mental suffering."<sup>52)</sup> The criminal prosecution of an elder abuse defendant uses the "beyond a reasonable doubt" standard applicable in virtually all criminal proceedings.

The misdemeanor elder abuse provision indicates that "treatment of an

elderly person in a way that is likely to cause great bodily harm or death in circumstances where the elder's person or health may be endangered" is criminally punishable.<sup>53)</sup> Those who violate this provision two or more times may be fined up to \$2,000, imprisoned up to one year, or both.<sup>54)</sup>

The felony provision for physical elder abuse provides that if physical abuse causes great bodily injury to an elderly victim,<sup>55)</sup> perpetrators will receive an additional three years in state prison if the victim is under 70 years old; and an additional five years if the victim is 70 years or older.<sup>56)</sup> If elder abuse is the proximate cause of death, the abuser receives an additional five years in prison for victims who are under 70 years of age, and an additional seven years in imprisonment if the victim is 70 or older.<sup>57)</sup> The California criminal law also provides for punishment for caretakers and non-caretakers who commit criminal theft, embezzlement, fraud, identity theft, forgery, or false imprisonment against the elderly.<sup>58)</sup>

There are also other legal avenues attempting to support criminal elder abuse prosecutions. For example, California law allows for expedited criminal trials when an elderly person is a witness or victim in a case.<sup>59)</sup> Indeed, criminal cases where a victim is at least 70 years old are given precedence over other criminal trials.<sup>60)</sup> The statute also requires that the trial shall begin within thirty days of arraignment.<sup>61)</sup> Also, elderly victims may obtain restraining orders against perpetrators of abuse, which can be issued *ex parte*.<sup>62)</sup>

### III. Japanese Regulation

#### A. Law of Prevention of Elder Abuse (EAPCSL)

##### 1. Enactment of EAPCSL

Japan enacted the Long-Term Care Insurance Act in 1997.<sup>63)</sup> One purpose



of the enactment of the law was to lessen the burden of caregivers and reduce elder abuse, which has been occurring more frequently as the society changed. The law demands the creation of Community General Support Centers, which have the role of preventing elder abuse and protecting the rights of the elderly. This law, which mainly created the long-term care insurance system, was of course not enough to address the problems of elder abuse. Thus, there was a need for a law that specialized in elder abuse while also utilizing the Community General Support Centers. After struggles by researchers, attorneys, municipalities and other practitioners in researching elder abuse and supporting the abused elderly, the “Elder Abuse Prevention and Caregiver Support Law” (“EAPCSL”),<sup>64)</sup> so called the “Law of Prevention of Elder Abuse,” was finally enacted in 2005.<sup>65)</sup>

Hence, in Japan, elder abuse is a national issue addressed through national law. In EAPCSL, an elder abuse is an abuse of a senior over 65 years of age done by caregivers at home and at elder care facilities.<sup>66)</sup> EAPCSL is structured to regulate the elder abuse by caregivers at home and at elder care facilities separately. The caregiver at home does not need to live with the elderly.

## 2. Types

Generally speaking, the definition of elder abuse is similar to the one of the United States.<sup>67)</sup> Article 2 sections 3, 4, and 5 of EAPCSL define elder abuse, specifically physical abuse, neglect, psychological abuse, sexual abuse and/or financial abuse by the caregivers at home and in elder care facilities. Definitions of abuse are stated separately for abuse by caregivers at home and by practitioners at care facilities. Both definitions are similar and the only difference is that neglect by a practitioner includes “neglect significantly an official duty to care for an elderly person” and excludes neglecting a person living together from abusing the elderly.<sup>68)</sup>

Physical abuse is violent conduct that results or could result in external wounds to the body of an elderly person.<sup>69)</sup> Physical abuse can include violent conduct resulting in pain, as well as intentional and continuous isolation of an elderly person from the outside world, such as forcing foods into his or her mouth, tying up in a bed, or giving excess medicine intentionally to restrain an elderly person.<sup>70)</sup>

Neglect is the intentional or unintentional abandonment and nonprovision of care by a caregiver that worsens the living environment and bodily or psychological condition of an elderly person. It includes conduct such as cutting down food significantly or leaving an elderly person for an extended period that results in the weakening of the elderly, or leaving a person living together with the elder person who is not a caregiver to conduct similar physical, psychological or sexual abuse.<sup>71)</sup>

Psychological abuse is significant use of abusive language or significant dismissive behavior of an elderly person, or other speech and behavior that could render a significant psychological injury to an elderly person.<sup>72)</sup> Psychological abuse includes a threatening or insulting word, a domineering attitude, neglect, and harassment that could create a psychological and emotional pain.

Sexual abuse is an act of obscenity towards an elderly person, or making an elderly person perform an obscene act.<sup>73)</sup> Every sexual act or demanding of an act that has no mutual agreement with an elderly person is sexual abuse. This kind of abuse can include leaving an elderly person naked, kissing, touching sexual organs and demanding sex.

Financial abuse is liquidation of an elderly person's property unjustly, by a caregiver or by an elderly person's family member, or other unjust profiting from an elderly person.<sup>74)</sup> Financial abuse includes restricting, without reason,

the use of money as an elderly person wishes. As for the financial abuse, abuse by family members who are not caregivers is also regulated.<sup>75)</sup> Financial abuse is the kind of abuse that is characteristic of elder abuse compared to child abuse.<sup>76)</sup>

### 3. Characteristics of EAPCSL

A key characteristic of EAPCSL, and in contrast to USA law, is that beyond prohibiting elder abuse, EAPCSL also provides support to caregivers.<sup>77)</sup> It is of course important to resolve the problems of elder abuse, but philosophically the law recognizes that support reduces the burden on the caregivers and could prevent elder abuse. So to protect the elderly and retain their dignity preventively, the law extends support to caregivers and states the responsibilities of the administration concerning these measures. This ideology is reflected in the title of the law and is stated in the purpose of the law.<sup>78)</sup> The support provided to all caregivers includes consultation, guidance and advice by the municipalities regarding available long-term care services, methods to take care of the elderly, and advice on the working and care conditions of the caregivers. These measures are needed, since the abuse could be the result of the stress of caring and having no counseling or support available. Municipalities could also let the elderly stay in the care facilities for a short time to reduce the burden of the caregivers.<sup>79)</sup>

Like the USA, the law focuses on reporting for detection of elder abuse. It states that responsible bodies, such as care facilities, hospitals, public health centers, any other organizations that service the welfare of the elderly, including practitioners at care facilities, physicians, public health nurses, attorneys and other persons whose job relates to the welfare of the elderly must recognize that they are in a position to discover elder abuse easily. Hence, according to the law, they must make a sincere effort to detect elder abuse

in its early stage.<sup>80)</sup> However, since no penalty is applied for lack of reporting, elder abuse is not detected easily.

## B. Regulation of the Caregivers

### 1. Caregivers at Home

Beyond the general obligation of the responsible bodies in detecting elder abuse, any person who *thinks* he or she has found a senior being abused by a caregiver at home *must make an effort to* report to the municipalities as quickly as possible.<sup>81)</sup> Further, when this senior's life or body is in serious danger, the person who has found him or her *must* report to the municipality immediately.<sup>82)</sup> Hence, every person in Japan is a mandated reporter. In an effort to promote reporting, a reporter's obligation to observe confidentiality under the other laws does not preclude him or her from reporting. Moreover, the law does not exclude the false or negligent report, in case of elder abuse done by caregivers at home. Thus, for example, a physician who misdiagnosed an injury as elder abuse and made a report does not become guilty for disclosing the patient's personal (confidential) information.<sup>83)</sup> Officers at the municipalities must not disclose any information that could specify the reporter.<sup>84)</sup>

The law is important for its language that anyone who "thinks" he or she has found a senior being abused must make an effort to report.<sup>85)</sup> This legal standard for reporting potential abuse is similar to the one of the United States, which is "knowledge" or a "reasonable suspicion" that an abusive event has taken place, rather than absolute certainty of its occurrence. It is difficult to be certain about elder abuse, but it is important to detect the abuse early. Preventing elder abuse would be easier this way.

### 2. Practitioners (Caregivers) at the Facilities

The practitioners at care facilities are mandated to report elder abuse

they find at their facilities.<sup>86)</sup> Further, any person who thinks he or she has found an elderly being abused by practitioners at care facilities must make an effort to report, or must report in case of a serious danger, to the municipality as quickly as possible, in the same way as the abuse in the home. Once again, the reporter's obligation to keep the secrecy under the other laws does not preclude him or her from reporting.

Importantly, the practitioners at the care facilities cannot be fired or retaliated against for reporting, except in the case of a false or, unfortunately, a negligent report. This latter line of law that does not exclude negligence in making a report has been criticized for hindering practitioners from reporting.<sup>87)</sup> As well, the culture of employers, including training employees, must be improved to facilitate an atmosphere of reporting.

### C. Role of Municipalities

The primary agency designated by EAPCL to create measures for and investigate elder abuse is the municipality. Each municipality must create a Community General Support Center itself, or that function may be outsourced. Public health nurses, "care managers" and social welfare workers are ideally supposed to work together at the center to extend the comprehensive measures preventing elder abuse. The center also purportedly has a role in creating a network of attorneys, judicial clerks, social welfare workers, physicians, and other professionals concerned with elder abuse. However, limited staff and funding create issues for addressing the needs of seniors despite the law.<sup>88)</sup>

The municipality that receives a report on elder abuse must first confirm the safety of the elderly and facts surrounding the report. Once this is done, it then must consult with the collaborating parties, such as Elder Care Support Center,

Community General Support Center, and other related or private organizations to discuss the case by a case conference method.<sup>89)</sup> Within each case conference discussing the reported case, the presence of attorneys is recommended.

When there is a serious danger to the elderly at home, the mayor can send officials from a General Support Center or other related agencies to the senior's home to conduct the necessary investigation and ask questions.<sup>90)</sup> If anyone refuses, disturbs, or evades the on-site inspection, does not answer the questions, answers falsely, prevents the elderly from answering or forces the elderly to reply falsely, he or she is liable up to a maximum fine of 300,000 yen.<sup>91)</sup> Since this is not a criminal investigation, the officials cannot enter the home by force. The mayor can ask, or has to ask in case of danger, for help by the police when conducting on-site inspections.

The municipality, in the case of a serious danger of abuse, is immediately required to access home care services for the elderly, such as day services, home-helpers and a short stay, or admit the elderly to elder care facilities, such as nursing homes, to prevent further abuse by the caregivers.<sup>92)</sup> When needed, the municipality can also appeal to appoint an adult guardian.

During the time the senior is committed to the elder care facility, the mayor and the head of the care facility can restrict the abusive caregiver from contact with the elderly.<sup>93)</sup> This provision is useful since the visits by an abuser can be restricted without a court order.

Municipalities are required to consult, guide and advise any caregivers, not only the one accused of elder abuse, and take any needed measures to reduce the burden of the caregivers.<sup>94)</sup> This includes letting the elderly stay in a care facility for a short time when there is an immediate need of reducing the burden of the caregiver. In addition, explanations to caregivers are promoted regarding the way to use the Long-Term Care Insurance, other

welfare services, and the adult guardianship system. Classes teaching methods of caring are also recommended, since ignorance about the way of caring or dementia could cause stress to the caregivers. These measures should be more than consulting, guidance or advice regarding the way to provide the long-term care. They could be support to find jobs for the caregivers that improves working and caring condition of the caregivers, psychological counseling that unravels the tangled feelings between the elderly, assistance in receiving public assistance, or any other diverse and comprehensive measures.

Municipalities must publicize the authorities that conduct activities on elder abuse and other collaborating parties.<sup>95)</sup> This provision is virtually unique since there have been no other laws that have stated the duty of government administration to publicize information on welfare services.<sup>96)</sup> However, the reality is that not many people know that they need to report or where to report when they find elder abuse.

In the case of elder abuse at care facilities, municipalities must inform prefectures about the abuse report they received.<sup>97)</sup> Then the municipalities and the prefectures are mandated to use their respective authorities to secure the appropriate operation of the facilities.<sup>98)</sup> Under various laws, the administration has the power to supervise and, for example, enter the facility, and question, inspect, investigate, counsel, and order the facility to suspend or partially suspend its operation.<sup>99)</sup>

#### D. Other Measures against Elder Abuse

Beyond laws specifically addressing elder abuse, there are other third party grievance settlement bodies, i.e., arbitration bodies that could be used in the case of elder abuse. One is the “Reasonable Steering Committee” placed at each prefecture’s Council of Social Welfare. It is a general grievance settlement

body regarding care facilities. There is also a grievance settlement body at the Federation of National Health Insurance Association, specializing in complaints concerning long-term care services. A user of long-term care services, including elder care facilities, may complain about any abuse that has occurred there. However, both these systems are not optimal, since it is difficult for the residents to complain about the facility they are currently living in without the facility identifying the person who complained. There is also a need to improve staffing of the secretariat of the committee. Since these grievance settlement bodies deal with general complaints, the need for a body that specializes in elder abuse for a swift and adequate response is especially needed.<sup>100)</sup>

There are also welfare ombudsmen who are created by the government, each facility, a network of the communities, citizens, or by other actors in some municipalities. However, welfare ombudsmen have no legal standing so there are limits to what they can do, and they are not as active as in the United States.

When elderly people are subject to elder abuse, they may also sue privately as a civil case, or the prosecutors could place charges against the perpetrator as a criminal matter. However, unlike the United States, there are no special laws for elder abuse regarding the civil and criminal charges, such as on the standard of proof or fee provisions.

## IV. Discussion

### A. Lack of Success

Despite the extensive infrastructure of laws and policies governing elder abuse in the USA, success in addressing this tremendously important social problem remains elusive. Elder abuse continues to be a pervasive and complex problem. The statistics are astonishing: in the USA, every nineteen seconds an



elderly person is abused;<sup>101)</sup> and up to 2 million Americans age 65 or older have been injured, exploited, or mistreated by someone they depended on for care or protection.<sup>102)</sup> The USA is clearly not doing a good job in preventing this social scourge.

Japan is also struggling with the problem of elder abuse. According to the survey done by the Ministry of Health, Labour and Wealth, there were 19,971 reports and 13,273 elder abuses at home in 2007: 27 elderly died having been abused; 13 homicides, 7 from neglect, 4 died together with caregivers, and 3 deaths resulted from the abuse.<sup>103)</sup> As for the case of care facilities, there were 379 reports and 62 abuse cases that were confirmed. Unfortunately, like in the USA, family members were implicated in a substantial number of cases: 40.6% of abusers at home were sons, 15.8% husbands, and then daughters, daughters in law and wives followed. 77.4% of victims were female. By category, in Japan, 63.7 % of abuses were physical abuse, 38.3 % were psychological abuse, 28 % were neglect, 25.8% were financial abuse, and 0.7% were sexual abuse. Within these abuses at home, 35.5 % of the elderly were moved to care facilities to solve the problems. This survey is cited to show merely the tip of an iceberg of actual abuse cases.

## **B. Limited Reporting and Increasing Incidence**

### **1. USA**

Elder abuse is rarely reported, even in the context of states mandatory reporting laws. For example, an estimated four out of five cases of elder abuse go unreported according to the American College of Obstetricians and Gynecologists.<sup>104)</sup>

Further, this is not a new phenomenon; instead, it is a growing one. The US National Elder Abuse Incidence study reported that of the more than

500,000 victims of abuse in 1996, only 16 percent of abusive situations were reported to authorities.<sup>105)</sup> Yet despite legal attention and recognition of elder abuse at that time, its incidence continues to escalate.<sup>106)</sup> By 2004, the national survey of state APS programs data showed an astounding 61% increase in the number of elder and vulnerable adult abuse reports since 2000.<sup>107)</sup> To add insult to injury, only a minute fraction of even the small number of reported cases ever result in criminal prosecution or civil litigation.<sup>108)</sup>

Indeed, focusing only on the state of California, the estimated incidence of elder abuse is similarly high. More than 225,000 reported cases of elder and dependent adult abuse are received by APS annually, with most (two-thirds) of reported abusers being family members.<sup>109)</sup> Yet like national statistics and despite the large number of reported cases, it is estimated that only one in five cases of elder abuse is actually reported.<sup>110)</sup> This leaves a large number of victims suffering in silence without support or recourse in their abusive situation.

## 2. Japan

In Japan, EAPCSL focuses on facilitating the reports rather than punishing the abuser. Thus, no strict evidence is required, as in the case of a criminal procedure, in reporting elder abuse. As noted previously, a person only needs to think there is an abuse. So in terms of the law, it should be easy to report. However, the law is not being used as much as it should be. One potential reason is lack of penalty for not reporting. Further, only the practitioners at the care facilities must report if the elderly is not in a serious danger.<sup>111)</sup> At care facilities, family members are hesitant to report abuse by practitioners, since there is often a lack of alternate facilities to which to move the elderly. Proving the abuse is also a task hindering family members from reporting the abuse they find at the facility.<sup>112)</sup>

Consequently, the Japanese situation is similar to the United States, although there is no good estimate on the number of unreported or actual abuse cases. Available research shows that very few elderly persons report themselves being abused (1.4 % at home; 5.3 % at facilities),<sup>113)</sup> but clearly there are barriers to reporting. Thus, it is important to assist the elderly by empowering them to report or enable others to detect and report the abuse. This reporting could be enhanced by building a good network of families, adult guardians, welfare workers, officials of municipalities, policemen, attorneys, and others concerned with elder abuse, but clearly it is a difficult problem to address. At this time, it appears that only some municipalities have been able to build robust networks.<sup>114)</sup>

### C. Lack of Research Interest and Funding

Beyond the obvious legal challenges to preventing and deterring elder abuse when there is limited reporting, and although risk factors are known and elder mistreatment has received some increased attention from policymakers and healthcare providers, there remains a lack of interest on the part of researchers in this critical area.<sup>115)</sup> The USA National Institute on Aging (NIA) reported less than 50 peer-reviewed studies on elder abuse in the scientific literature; no comprehensive, population-based study on the incidence and prevalence of elder abuse; and no common definitions of elders, abuse, neglect, or exploitation.<sup>116)</sup> Consequently, little continues to be known about the characteristics, causes, or results nor about effective ways to prevent and manage elder abuse in all its forms.<sup>117)</sup>

Although there has been some recognition of this substantial problem by the USA federal government, its funding to combat the problem remains low. The total federal expenditures directed toward elder abuse in 2004 was less

than 1% of federal funds spent for family violence.<sup>118)</sup>

Further, sufficient funding is a major challenge for programs and agencies designed to detect and fight elder abuse. Many key program implementation centers such as APS are consistently underfunded by the USA federal government.<sup>119)</sup> For example, the USA Social Services Block Grant (SSBG, Title XX of the Social Security Act) is the only source of federal funding for APS.<sup>120)</sup> In 34 states, APS is supported entirely or partially with federal SSBG funds and with little or no state funds.<sup>121)</sup> Further, in states where APS relies entirely on federal SSBG support, funding is not guaranteed because there are many agencies competing for SSBG dollars,<sup>122)</sup> and hence allocation is often based upon political expediency. Finally, only 2% of federal funds spent on all citizen abuse circumstances is allocated to elder abuse, and less than 1% of research money for aging issues is provided for elder abuse studies.<sup>123)</sup>

In Japan, EAPCSL states that the government must analyze the cases of elder abuse and research about prevention and measures against elder abuse.<sup>124)</sup> This provision aims to support the municipalities that are the responsible agencies concerning elder abuse. So there are some surveys conducted by the national and regional governments to capture the reality of elder abuse. However these surveys are not sufficient and research about elder abuse is clearly lacking. Furthermore, funds spent to support the actors concerning elder abuse are also insufficient. Of special note is that the General Support Centers, which should play the central role in the problems of elder abuse, need skilled staffing, but lack of sufficient funds limit their ability to perform their duties.<sup>125)</sup>

## V. Policy Recommendations

### A. Lessons from Each Country

It is apparent that both the USA and Japan have a significant problem with elder abuse. With the growing of the senior population, this social welfare concern will be exacerbated if no substantive reform is put into place.

Comparatively, both countries appear to recognize that there is a policy concern in the protection of the elderly. Yet despite policymaker attention, there are clear issues with the effectiveness of either system. Japan, especially, is still lacking experience in tackling elder abuse compared to the United States, in spite of enacting the new law.

The attention that has been paid to this issue across these countries has resulted in different strategies that may be useful for the other. Policymakers should focus on complementary changes that build upon the laws already in place to promote additional, effective approaches in addressing the limited effects currently in place.

One key area is reporting. Both countries suffer from a dearth of reporting, but for different reasons. In the United States, an important component of reporting is the virtual lack of any penalties associated with reporting, as long as it is done in good faith. A key policy change for Japan in this area would be to eliminate “negligent” reporting by the practitioners at the care facilities from article 21 section 6 and 7 of EAPCSL, so that an employer cannot fire or disadvantage a practitioner, and the practitioner cannot be accused of revealing confidential information for making a negligent report. This “carrot” may then lead to professionals that are clearly in the position of observing or suspecting abuse to be able to report without fear of being prosecuted or disadvantaged

for “negligent” reporting.

However, further, the “stick” in the USA of mandatory reporting, which would not only mandate an “effort” to report but require it, may also promote reports of elder abuse. This means mandating that not only a practitioner at a care facility, but every person in a position to report in all circumstances, regardless of the case whether a senior’s life or body is in serious danger. Importantly, this includes family members serving in any caregiver role. The security of the elderly person should not be risked, even when it is difficult for the family. Using the law to mandate that reports occur, rather than penalizing those who report erroneously, errs on the side of more reports rather than less. Indeed, it would be luxury in this area to have too many reports to address.

Yet, as a social condition, Japan has enacted an important concept: that all people are mandated reporters. This approach provides, and indeed empowers, every citizen to be educated on, and be knowledgeable about elder abuse, and allows action by each citizen about it. This is certainly not the reality in the United States, by law or in practice. An appropriate statement through legal reform and statute as in Japan can provide significant attention and social awareness to this issue. Of course, despite the language of the law, there are only a few reports and not many people know they are mandated reporters in Japan. So there is a need for measures to enforce the law as well.

Further, the lack of knowledge of seniors as well as others on the social welfare programs available in the USA can take a lesson from Japan. Mandating dissemination of available support services as under Japanese law in the USA could provide more seniors, caregivers, and others, important information on what programs are available to support the elderly in the community. This is of critical concern particularly because many of the elderly are cut off from communications with the broader community, and have no

means by which to discover programs that may be available to help them and address their circumstances. In Japan, a Community General Support Center has the responsibility of publicizing the information on the welfare programs, and could be an interesting model for emulation by the USA. However, it needs more funds to function well.

The institutionalized elderly have important, special concerns. Here, both the USA and Japan have approached the issue in part using an ombudsman and other third party observation systems. Yet each suffers for different fundamental reasons. Japan mainly uses grievance settlement bodies to reflect the voices of the institutionalized elderly. Ombudsmen are acting only in few regions as of yet; Japan does not mandate ombudsmen or provide these persons with legal status that would require institutions to answer for concerns raised by them. In the United States, ombudsmen have legal status, but are not trained to identify elder abuse.<sup>126)</sup> Hence, both countries may wish to adopt a model of ombudsmen that have legal standing to enter, observe, and require changes of condition and treatment of the elderly residing there using independent paid, trained clinical staff. For this, sufficient funds are needed to hire the experienced staff ombudsman. Japan could especially learn from the experience of the USA and introduce welfare ombudsmen nationally.

Importantly, Japan is unique in recognizing the need to preventively address elder abuse by recognizing the needs of caregivers. Although done informally at times by case managers in the United States,<sup>127)</sup> no legislative mandate exists to provide counseling and support to caregivers who are likely under significant stress to provide adequate services to the elderly, particularly if caregivers are family members. This is a key lesson that needs to be learned by USA policymakers to address the incidence of elder abuse.

From a prosecution perspective, Japan could learn from the US laws,

such as EADACPA in California, which details strategies to prosecute elder abuse. In both civil and criminal cases, the law that addresses elder abuse specifically in civil damages and criminal charges makes it easier to prosecute elder abuse. First of all, mandating the cross-reporting to law enforcement and training prosecutors about elder abuse would help the emergency cases. Imposing additional years of imprisonment on the elder abuse perpetrators, especially when the victim is 70 years or older, could be considered in Japan to also promote protection of the elderly and deter crimes against them. It would also make the seriousness of elder abuse more apparent to a greater number of people. Expedited trials for an elder abuse victim who is older than age 70 in both civil and criminal actions is also a practical approach to gain justice for the abused elder and quickly bring perpetrators of crimes against them to justice.

Finally, it is imperative for both countries to allocate adequate funds to investigate, research, and provide opportunities for additional learning on the presence of elder abuse, what contributes to it, and what can be done to effectively prevent and address it. Without adequate funding, the issue will continue and limit any progress while the senior population continues to grow, and the problem gets worse. Resources devoted to secondary health care needs of abused patients, social welfare needs, social security, and other costs will escalate unless an investment is made now to address the problem of elder abuse.

## B. Autonomy versus Protection

In all of these reform efforts, another consideration bears mentioning. The autonomy and independence of elders must always be a focus.

Elder abuse is complex and different from, for example, child abuse, since seniors are adults. The balance between the autonomy of the elderly and



the intervention for elder abuse is a difficult issue,<sup>128)</sup> but protection must not trump independence and autonomy within his or her community.

Even when there is an objective evidence of elder abuse, if the senior independently refuses an intervention that represents his or her true intent, society must respect that decision. Note, however, this must represent a true intent. Cases where the abuser in fact makes the elderly refuse the intervention, or the elderly refuses willingly due to hesitation and fear of retaliation by the family abuser is not true intent and, instead, represents coercion on the part of the abuser. Thus, there must be substantive investigation of the circumstances to assess the situation surrounding the refusal of intervention; one should not leave the elderly easily believing in his or her words, especially when there is a doubt regarding a danger to the life or body.

For addressing elder abuses caused by family caregivers, it is sometimes necessary to sever the relationship between the elderly and the family abuser, and moreover to let the elderly live in alternate care facilities.<sup>129)</sup> This is also sometimes harder than in a case of a child abuse or a domestic violence. The elderly persons have been members of families throughout their life and may have been living in their homes and the communities for an extended time.<sup>130)</sup> They may believe, and the reality may be, that there often is not that much time left to start the life over and make new relationships. So many frail elderly hesitate to cut relationships with their families, even despite abuse, to leave the homes where they have been living. However, in some cases, this must be done. For example, 35.5 % of the elderly had to give up staying at home and move to hospitals or care facilities to terminate the abusing situation in Japan.<sup>131)</sup> Hence, these cases indicate that for resolving the problems of elder abuse, ultimately, there is a need to create a support system that enables

the elderly to live continuously at home and in the community, with the community providing support and assessment of the senior living conditions and presence of potential abuse.<sup>132)</sup>

### C. Two Approaches Addressing Elder Abuse

Comparisons between both countries have found two different approaches and policy possibilities to regulate elder abuse. One is a reactive approach such as the one developed in the United States and the other is a preventive approach such as the one Japan is trying to establish. These two themes exist in the policies of each country to a certain extent. However, both these countries and indeed other countries could give further consideration to having laws and systems that include both approaches to prevent and sanction elder abuse.

Reactive approaches are important in the aftermath of elder abuse and in an effort to deter future conduct. These include facilitating claims for damages in civil cases. They also include laws that create special categories of crimes for elder abuse both on misdemeanor and felony levels. Sanctions are heavier, including greater fines and longer imprisonment, when the victim is older than a certain age. As well, clearly prohibiting those convicted of elder abuse from receiving inheritances from their victims is an important tool to limit these activities.

Creating judicial procedures for elder abuse cases as reactive measures could facilitate those cases. For example, for both civil and criminal cases where an elderly person is a witness or a victim, an expedited trial would help the elderly, especially when the elderly is frail. It is an important systemic change to take into account the elderly him or herself, as well as signaling the importance of such cases. In addition, issuing restraining orders against perpetrators of abuse using *ex parte* hearings would be useful. Depending on

the original system, the way to pay the legal costs that would promote lawyer participation should be considered, including increasing legal payment for such prosecutions.

Preventive approaches focus on measures that support the caregivers to reduce the potential for abusive behavior against the elderly. This approach may be effective in reducing future abuse, especially when an elderly person needs continuing care from a caregiver and since many abusers are family members. For the abuses by caregivers at home, some of the following measures may be useful.<sup>133)</sup> a) Consulting, educating and advising caregivers, b) Curing the abused elderly, c) Separating the elderly temporarily from the caregiver, d) Introducing or increasing the care services to the elderly, e) Changing the caregiver, f) Administrating the assets of the elderly by a third party, g) Assigning an adult guardian, and h) Supporting the financial status of the caregivers and supporting their financial circumstances, such as helping to find jobs, filing for bankruptcy, or helping them obtain public assistance.

Consulting, educating and advising caregivers is particularly needed, since stress is high when caregivers must address the stress of daily living alone while also taking care of an elder person, and who may also lack knowledge on elder care or abuse. These circumstances could hence create the perfect storm, leading to abuse of the elderly. If long time friction between the elderly person and caregiver is the or a cause of abuse, counseling or arbitration could help. In addition, the heightened needs of the caregiver should be taken care of, particularly when the elderly person has other physical or mental disability.

In an effort to prevent abuse by caregivers at care facilities, some of the following measures could be considered: a) Training the practitioners on elder abuse, b) Creating a grievance settlement system or a third party committee at the facility to work on elder abuse and conflict issues, and c) Improving

administration accountability, including creating a system to manage financial resources of residents. In addition, supporting the practitioners and improving the working conditions at these facilities is a crucial factor in reducing elder abuse.

Above all, creating a network of a wide spectrum of professional and community members and stakeholders detecting and solving the problems of elder abuse is important in preventing and punishing elder abuse. When both systems are in place, they may work together to address these social concerns. For example, preventive systems that provide education on the community level, in hospitals, across providers, in other facilities such as banking institutions, social services groups, and senior community centers, can raise knowledge and awareness of how to recognize abuse. Reactive approaches can integrate some of these very educators in recognizing abuse and cooperating with law enforcement and prosecution efforts as well as case management services in all cases where abuse occurs. This complementary effort can best prevent and deter elder abuse if implemented successfully.

## VI. Conclusions

Despite the differences in culture between Japan and the United States, we have the social concern of elder abuse in common. Further, we have the lack of attention to this issue of mutual concern as well. In both countries, it is a “nation’s shame.”<sup>134)</sup> These are the very populations who have given much to society, and are now the most vulnerable. The social contract, ethical precepts, and moral convictions demand we act to ensure these citizens are protected and may live their days in dignity. By understanding the different approaches and strategies across our societies, we may begin to learn how to address this

most important of social welfare issues. Time is of the essence that we do so; for the next elder and the next generation of elders to be harmed by abuse may be us, our children, and our children's children.

- 1) See Ministry of Internal Affairs and Communications, Statistics Bureau, *Population Estimates by Age (5-Year Group) and Sex*, POPULATION ESTIMATES, MONTHLY REPORT, March 1, 2009, available at: <http://www.stat.go.jp/english/data/jinsui/tsuki/index.htm> (last visited August 23, 2009).
- 2) See Federal Interagency Forum on Aging-Related Statistics, *Population (2008)*, available at: [http://www.agingstats.gov/agingstatsdotnet/Main\\_Site/Data/2008\\_Documents/Population.aspx](http://www.agingstats.gov/agingstatsdotnet/Main_Site/Data/2008_Documents/Population.aspx) (last visited on August 23, 2009).
- 3) See National Institute of Population and Social Security Research, "*Population Statistics of Japan 2008, Table 2.8 Indications on Age Structure of Projected Population: 2005-2055*" and "*Table 2.9 Actual and Projected Population by Age: 1920-2055*", available at: <http://www.ipss.go.jp/index-e.html> (last visited on August 23, 2009) (noting one-quarter of the total population of 95 million will be 75 or older, and 40 percent will be 65 or older by 2050); and Federal Interagency Forum on Aging-Related Statistics, *supra* note 2 (noting USA older population in 2030 is projected to be twice as large as in 2000, growing from 35 million to 71.5 million and representing nearly 20 percent of the total U.S. population).
- 4) See, e.g., Ministry of Internal Affairs and Communications, Statistics Bureau, *Population (Chapter 2)*, STATISTICAL HANDBOOK OF JAPAN, 2008, available at: <http://www.stat.go.jp/english/data/handbook/c02cont.htm> (last visited August 23, 2009); and Arlene D. Luu & Bryan A. Liang, *Clinical Case Management: A Strategy To Coordinate Detection, Reporting, and Prosecution of Elder Abuse*, 15 CORNELL J. L. & PUB. POL'Y 165, 166 (2005).
- 5) See Fusako Seki, *The Role of the Government and the Family in Taking Care of the Frail Elderly — A Comparison of the United States and Japan*, SERGE GAUTHIER ET. AL EDS, AGING: CARING FOR OUR ELDERS, 11 INTERNATIONAL LIBRARY OF ETHICS, LAW AND THE NEW MEDICINE 83-105 (2001).
- 6) See Sande Buhai and James Gilliam, Jr., *Honor Thy Mother and Father: Preventing Elder Abuse Through Education and Litigation*, 36 LOY. L.A. L. REV. 565, 566 (2003).
- 7) For example, in the USA, six out of ten elder abuse victims experience some degree of confusion and more than three in four have difficulty caring for themselves. See Charles Pratt, *Banks' Effectiveness at Reporting Financial Abuse of Elders: An Assessment and*

- Recommendations for Improvements in California*, 40 CAL. W. L. REV. 195, 203 (2003).
- 8) See M.F. Hudson, *Elder Mistreatment: a taxonomy with definitions by Delphi*, 3 J. ELDER ABUSE & NEGLECT 1-2 (1991). See also NATIONAL ASSOCIATION OF ADULT PROTECTIVE SERVICES ADMINISTRATORS, ELDER ABUSE AWARENESS KIT; A RESOURCE KIT FOR PROTECTING OLDER PEOPLE AND PEOPLE WITH DISABILITIES 4 (2001).
  - 9) See Hudson, *id.* Definitions also found in the Older Americans Act, 42 U.S.C. § 3002(13) (2000), and World Health Organization, *Chapter 5 Abuse of the Elderly, World Report on Violence and Health* 125, available at: [http://www.who.int/violence\\_injury\\_prevention/violence/world\\_report/en](http://www.who.int/violence_injury_prevention/violence/world_report/en) (last visited August 24, 2009).
  - 10) See *id.*
  - 11) See Seymour Moskowitz, *Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect*, 36 LOY. L.A. L. REV. 589, 593 (2003).
  - 12) *Id.* at 596.
  - 13) See Akilah Johnson, *Advocate is Committed to Fighting Elder Abuse*, L.A. TIMES, Aug. 1, 2003, at B2.
  - 14) See Moskowitz, *supra* note 11.
  - 15) See *id.* at 598.
  - 16) *Id.*
  - 17) See Seymour Moskowitz, *Saving Granny From the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 91 (1998).
  - 18) See Moskowitz, *supra* note 11 at 599.
  - 19) *Id.* at 600.
  - 20) See *id.*
  - 21) *Id.*
  - 22) See Moskowitz, *supra* note 17 at 91.
  - 23) See Donna Schuyler & Bryan A. Liang, *Reconceptualizing Elder Abuse: Treating the Disease of Senior Community Exclusion*, 15 ANNALS HEALTH L. 275, 283 (2006). Note that for nursing facilities, reporting may also be through a voluntary ombudsman program. See Bryan A. Liang, *Elder Abuse Detection in Nursing Facilities: Using Paid Clinical Competence to Address the Nation's Shame*, 39(4) J. HEALTH L. 527 (2006).
  - 24) Cal. Welf. & Inst. Code § 15630 (West 2005).
  - 25) *Id.*
  - 26) *Id.*
  - 27) Code of Virginia H.B. 952 and S.B 318, effective July 1, 2004, available at: [http://www.ncea.aoa.gov/Main\\_Site/pdf/publication/APSLegSummary 2004. pdf](http://www.ncea.aoa.gov/Main_Site/pdf/publication/APSLegSummary 2004. pdf) (last visited October

- 24, 2009).
- 28) Cal. Welf. & Inst. Codes § 15650(a) & (b).
  - 29) National Center on Elder Abuse, Laws and Legislation, available at: [http://www.ncea.aoa.gov/NCEARoot/Main\\_Site/Index.aspx](http://www.ncea.aoa.gov/NCEARoot/Main_Site/Index.aspx) (last visited October 24, 2008).
  - 30) In federal legislation, the concept of corroboration was suggested in the OAA amendments of 2000, where Congress said that States should increase coordination between law enforcement and the courts. See Schuyler & Liang, *supra* note 23 at 284 n.64.
  - 31) Cal. Welf. & Inst. Code § 15640 mandates cross-reporting between APS and law enforcement.
  - 32) See Schuyler & Liang *supra* note 23 at 284.
  - 33) See *supra* note 27.
  - 34) *Id.*
  - 35) *Id.*
  - 36) See State of Kentucky, H.B. 298, available at: <http://www.lrc.ky.gov/record/05rs/HB298.htm> (last visited December 1, 2008). See also NCEA Newsletter, June 2005, available at: [http://www.ncea.aoa.gov/Main\\_Site/pdf/publication/APSLegSummaryChart.pdf](http://www.ncea.aoa.gov/Main_Site/pdf/publication/APSLegSummaryChart.pdf).
  - 37) *Id.*
  - 38) *Id.*
  - 39) *Id.*
  - 40) See US Administration On Aging, *A Profile of Older Americans: 2004* (2005). Also, in 2000, the greatest number of centenarians (5,341) lived in California. US Census Bureau, 2001, available at: <http://www.census.gov/prod/www/abs/popula.html> (last visited August 23, 2008).
  - 41) See *generally*, Cal. Welf. & Inst. Code § 15600 (West 2005) through § 15675.
  - 42) *Id.* EADACPA also addresses confidentiality issues, liability, evidentiary standards, and establishes public policy.
  - 43) Cal. Welf. & Inst. Code § 15656 (West 2005).
  - 44) See *generally*, Cal. Welf. & Inst. Code, Division 9, Public Social Services, Chapter 11, Elder Abuse and Dependent Adult Civil Protection Act.
  - 45) Cal. Welf. & Inst. Code § 15657 (West 2005).
  - 46) Cal. Welf. & Inst. Code § 15657.5 (West 2005).
  - 47) Other provisions of EADACPA allow elderly victims to seek protective orders to enjoin defendants from such things as abuse, intimidation, harassment, stalking, attacking, striking, making annoying phone calls, or contacting the elderly person by mail. Cal. Welf. & Inst. Code § 15657.03 (West 2005).

- 48) Cal. Prob. Code § 259 (West 2005).
- 49) Cal. Civ. Proc. § 36 (West 2005).
- 50) The California Legislature “finds and declares that crimes against elders and dependent adults are deserving of special consideration and protection because elders and dependent adults may be confused, on various medications, mentally or physically impaired or incompetent, and therefore are less able to protect themselves, to understand or report criminal conduct, or testify in court proceedings on their own behalf.” Cal. Penal Code § 368 (West 2005).
- 51) *See generally* Cal. Penal Code § 368 (West 2005).
- 52) Cal. Penal Code § 368(b) (1) (West 2005).
- 53) Cal. Penal Code § 368(c) (West 2005). The California Code defines an elder as a person sixty-five year of age or older.
- 54) Cal. Penal Code § 368(b) (1) (West 2005).
- 55) Cal. Penal Code § 368(b) (2) (West 2005).
- 56) *Id.* (Under Cal. Penal Code § 12022.7, great bodily injury is defined as significant or substantial physical injury).
- 57) Cal. Penal Code § 368(3) (West 2005).
- 58) Cal. Penal Code § 368(d) (e) (f) (West 2005).
- 59) Cal. Penal Code § 1048(b) (West 2005).
- 60) *Id.*
- 61) *Id.* However, section 1048(c) states, “nothing in this section shall be deemed to provide a statutory right to a trial with in 30 days.” Cal Penal Code § 1048(c) (West 2005).
- 62) Cal. Family Code § 6218 (West 2005). A court may issue a Domestic Violence Restraining Order if the victim shows reasonable proof of a past act or acts of abuse (Cal. Fam. Code § 6300). Abuse means to “intentionally or recklessly cause bodily injury; sexual assault; to place the victim in fear of imminent serious bodily injury,” (Cal. Family Code § 6203); or “to molest, attack, strike, stalk, threaten, batter, harass, telephone, destroy personal property, contact by mail, or come within a specified distance of, or disturb the peace of the victim.” (Cal. Fam. Code § 6320).
- 63) Long-Term Care Insurance Act: Act No. 123 of December 17, 1977. The law is translated at the Ministry of Justice, *Japanese Law Translation*: [http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&yo=&x=15&y=17&kn\[\]= % E3 % 81 % 8B&ky=&page=2&re=02](http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&yo=&x=15&y=17&kn[]= % E3 % 81 % 8B&ky=&page=2&re=02) (last visited August 23, 2009).

The Long-Term Care Insurance Act established a national long-term care insurance system, where all the elderly in need of care are paid for certain long-term care they



receive in their homes and at the elder care facilities. For the overview, see Ministry of Health, Labour and Welfare, *Overview of the Long-Term Care Insurance System*, 2008, available at: <http://www.mhlw.go.jp/english/wp/policy/dl/03.pdf> (last visited August 23, 2009).

- 64) Elder Abuse Prevention and Caregiver Support Law: Act No. 124 of November 9, 2005.
- 65) See JAPAN FEDERATION OF BAR ASSOCIATIONS (JFBA), COMMITTEE ON RIGHTS OF THE ELDERLY AND THE DISABLED EDS., HANDBOOK ON APPLYING LAW OF PREVENTION OF ELDER ABUSE (written in Japanese, Japanese title is: Koreisyā Gyakutai Boshiho Katsuyo Handbook) 18-19 (2006).
- 66) EAPCSL § 2, 2-2, 2-3. Note that unlike California, EAPCSL only protects the abuses to a person aged 65 years and over. Thus a disabled person or person in need of care who is under 65 years of age that is subject to abuse is not protected under this law. The Disabled Persons Abuse Prevention and Caregiver Support Bill was introduced to the Japan House of Representatives in July 2009, but the House broke up with the bill still tabled. Japan is also discussing the extension of long-term care insurance to disabled persons.
- 67) Japan, as always, has researched the experiences of the other countries before enacting its law. For example see *generally* PATRICIA BROWNELL ET AL., PROGRAMS ON PREVENTING ELDER ABUSE IN THE WORLD (Toshio Tatara and Noriko Tsukada trans., in Japanese) (2004).
- 68) EAPCSL § 2-5-1-ro.
- 69) EAPCSL § 2-4-1-i, 2-5-1-i.
- 70) For the explanations of the definitions, see NAOKI IKEDA, SHINSUKE TANIMURA & IKUKO SASAKI, Q&A LAW AND PRACTICE CORRESPONDING TO ELDER ABUSE (written in Japanese, Japanese title is: Q&A Koreisyā gyakutai taio no Horitsu to Jitsumu) 16-17 (2007).
- 71) EAPCSL § 2-4-1-ro, 2-5-1-ro.
- 72) EAPCSL § 2-4-1-ha, 2-5-1-ha.
- 73) EAPCSL § 2-4-1-ni, 2-5-1-ni.
- 74) EAPCSL § 2-4-2, 2-5-1-ho. The definition “by a caregiver or by an elderly person’s family member” is stated only for the elder abuse at home.
- 75) EAPCSL rules relate to abuses by caregivers. Abuses by persons living together who are not caregivers are not covered, except family members in case of financial abuse. When a caregiver ignores the abusive acts by a person living together, this act is defined by the law as “neglect.” Yet in actuality, there could be elder abuse when there is no caregiver present. It has been asserted that the law should be interpreted to include all abuses by persons living together. See JFBA, *supra* note 65 at 25. However, regarding financial abuse, *contra* definitional challenges apply, as it is difficult to interpret the law

allowing prosecution of the person living together with the senior, who is not a caregiver or a family member, as an abuser. In this case, that person's wrongdoing must be sued upon using the general civil law (unjust enrichment or tort) or criminal law (fraud or theft).

- 76) See JFBA, *supra* note 65 at 24.
- 77) EAPCSL § 6, 14. See JFBA, *supra* note 65 at 21-22, 31-32, 42-43, 78-102 and IKEDA, TANIMURA & SASAKI, *supra* note 70 at 13, 167-170.
- 78) EAPCSL § 1.
- 79) For the details of the supports to the caregivers, see the following section III C. "Role of Municipalities". See also Luu & Liang, *supra* note 4 at 193-194 (proposing case management intervention with caregivers as preventive approach to elder abuse).
- 80) EAPCSL § 5.
- 81) Responsible bodies for detecting elder abuse under article 5 are supposed to have more responsibility than the others in reporting elder abuse.
- 82) Note, however, there are difficulties with these provisions, the way the law is structured; "when the senior's *life or body is in a serious danger*, the person who found them *must* report." Problems arise in determining the "*serious danger*". There are so many levels and kinds of elder abuse that it is difficult for anyone to know when he or she must report.
- 83) See JFBA, *supra* note 65 at 34.
- 84) EAPCSL § § 7, 8.
- 85) See JFBA, *supra* note 65 at 33.
- 86) EAPCSL § 21.
- 87) See JFBA, *supra* note 65 at 50-51, 103-105 and IKEDA, TANIMURA & SASAKI, *supra* note 70 at 26. It is asserted that in the case, when it was reasonable for the reporter to believe in the abuse, the practitioner should not be accused as negligent and fired or disadvantaged for reporting.
- 88) See JFBA, *supra* note 65 at 44-46, 77-78, 130-136, 163-164 and IKEDA, TANIMURA & SASAKI, *supra* note 70 at 29-31, 33-41, 238-240.
- 89) EAPCSL § 9.
- 90) EAPCSL § 11.
- 91) EAPCSL § 30.
- 92) Under the Long-term Care Insurance System, an elderly usually contracts with all the kind of elder care services, including nursing homes. However, when there is a need, a municipality can commit the elderly to a hospital or a nursing home.

- 93) EAPCSL § 13.
- 94) EAPCSL § 6, 14. See JFBA, *supra* note 65 at 21-22, 31-32, 42-43, 78-102 and IKEDA, TANIMURA & SASAKI, *supra* note 70 at 13, 167-170.
- 95) EAPCSL § 18.
- 96) See JFBA, *supra* note 65 at 47.
- 97) EAPCSL § 22.
- 98) EAPCSL § 24.
- 99) See Public Aid for the Aged Act (Act No. 133 of 1963), Long-Term Care Insurance Act and Social Welfare Act (Act No. 45 of 1951).
- 100) See JFBA, *supra* note 65 at 121-122.
- 101) See Martin Ramey, *Putting the Cart Before the Horse: The Need to Re-examine Damage Caps in California Elder Abuse Act*, 39 SAN DIEGO L. REV. 599, 301 (2002).
- 102) See COMMITTEE ON NATIONAL STATISTICS AND COMMITTEE ON LAW AND JUSTICE, ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA (2002), available at: <http://books.nap.edu/catalog/10406.html> (last visited August 23, 2008). Elder mistreatment is defined as (a) intentional actions that causes harm or creates a serious risk of harm (whether or not harm is intended) to a vulnerable elder by a caregiver or other person who stands in a trust relationship to the elder or (b) failure by a caregiver to satisfy the elder's basic needs or to protect the elder from harm.
- 103) Ministry of Health, Labour and Welfare, *Result of the Survey on the situation corresponding to EAPCSL 2-13* (2008, in Japanese), available at: <http://www.mhlw.go.jp/houdou/2008/10/h1006-1.html> (last visited August 28, 2009).
- 104) See H.D. Nelson, P. Nygren, Y. McInerney, J. Klein, *Screening Women and Elderly Adults for Family and Intimate Partner Violence: A Review of the Evidence for the US Preventive Services Task Force*, 140(5) ANN. INTERN. MED. 387 (2004).
- 105) See NATIONAL CENTER ON ELDER ABUSE (NCEA), FAQ'S ABOUT ELDER ABUSE, available at: [http://www.elderabusecenter.org/print\\_page.cfm?p=faqs.cfm](http://www.elderabusecenter.org/print_page.cfm?p=faqs.cfm) (last visited August 23, 2008).
- 106) *Id.* "Incidence" generally means the number of new cases occurring over a specific time period.
- 107) NATIONAL ADULT PROTECTIVE SERVICES ASSOCIATION (NAPSA) CONFERENCE, September 29-October 1, 2004 WHITE HOUSE CONFERENCE ON AGING POST-EVENT SUMMARY REPORT (2004), available at: [http://www.apsnetwork.org/About/docs/WhiteHouseAgingReport\\_post2004.pdf](http://www.apsnetwork.org/About/docs/WhiteHouseAgingReport_post2004.pdf) (last visited December 8, 2009).
- 108) See Moskowitz, *supra* note 17 at 78.

- 109) See PREVENTING CRIME AND VIOLENCE IN CALIFORNIA, CALIFORNIA ATTORNEY GENERAL'S CRIME AND VIOLENCE PREVENTION CENTER, available at: <http://safestate.org/index-print.cfm?navid=11> (last visited August 23, 2008; and Cal. Wel. & Inst. Code § § 15610.27, 15610.23).
- 110) *Id.*
- 111) General reporter only must make an effort to report, if elder abuse at home does not seem to result in great bodily harm or death. This is different from child abuse, where an abusive event must be reported under any circumstances in Japan. The law was enacted this way, due to the complexity of elder abuse in relation to the autonomy of the elderly, and the relationship between the elderly and the caregivers or the family members.
- 112) Etsuko Furuhashi, *Long-term care by Family Member and Elder Abuse* (written in Japanese, Japanese title is: KAZOKU KAIGO TO KOREISYA GYAKUTAI), 29 SEIKYOKEN REV. 79, 95 (2007).
- 113) See Ministry of Health, Labour and Welfare, *supra* note 103 at 2.
- 114) *Id.* at 14. See also, Report, *Quick action is most important* (written in Japanese, Japanese title is: Naniyorimo Soki taio ga Jyuuyouni), 146 Monthly Publication Long-Term Care Insurance 48, 49 (2008).
- 115) See COMMITTEE ON NATIONAL STATISTICS AND COMMITTEE ON LAW AND JUSTICE, ELDER MISTREATMENT: ABUSE, NEGLIGENCE, AND EXPLOITATION IN AN AGING AMERICA 1 (2002), available at: <http://books.nap.edu/catalog/10406.html> (last visited August 23, 2008).
- 116) See NATIONAL ADULT PROTECTIVE SERVICES ASSOCIATION (NAPSA) CONFERENCE, *supra* note 107.
- 117) See *id.*
- 118) *Id.*
- 119) See NATIONAL COMMITTEE FOR THE PREVENTION OF ELDER ABUSE, 2005 WHITE HOUSE CONFERENCE ON AGING, POST-EVENT SUMMARY REPORT, MARCH 12, 2005, available at: <http://www.preventelderabuse.org/whcoaging2005.html> (last visited August 23, 2008).
- 120) *Id.*
- 121) *Id.*
- 122) *Id.*
- 123) *Id.*
- 124) EAPCSL § 26.
- 125) See JFBA, *supra* note 65 at 163-164.
- 126) See Liang, *supra* note 23.

- 127) See Luu & Liang, *supra* note 4.
- 128) JFBA, *supra* note 65 at 13 and IKEDA, TANIMURA & SASAKI, *supra* note 70 at 49-50.
- 129) See Luu & Liang, *supra* note 4 (discussing using case management to assess alternative care residence for abused elders) .
- 130) In Japan, there is no culture of moving to a better climate after retirement that many people tend to live in the same community if their jobs allow.
- 131) See Ministry of Health, Labour and Welfare, *supra* note 103 at 12.
- 132) See Schuyler & Liang, *supra* note 23.
- 133) JFBA, *supra* note 65 at 78-102.
- 134) See Liang, *supra* note 23.